Supreme Court, U.S.
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No. 97-1634

In The

Supreme Court of the United States

October Term, 1997

LARRY EVANS,

Petitioner,

v.

STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Nevada

REPLY BRIEF

JOHN GLENN WATKINS
Counsel of Record
804 S. Sixth Street
Las Vegas, Nevada 89101
(702) 383-1006
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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EVAN'S PREVENTS A PERSON FROM CHALLENGING JURISDICTION TO REVOKE HIS DRIVER'S LICENSE

a. The Department's Opposition ignores the distinction between actual driving and a mere reasonable belief that the person was driving.

Petitioner Evans complains and alleges a constitutional violation because the State of Nevada has eliminated the jurisdictional element under the implied consent law from consideration at the administrative license revocation hearing. In short, a person can lose his driver's license for drunk driving even though he *never* drove the vehicle.[1] The Nevada Department of Motor Vehicles and Public Safety (hereinafter the "Department") argues that driving is still an issue because the State must show that the police officer had a reasonable belief that the person drove the vehicle while drunk. The Department's position ignores the difference between actual driving and a reason to believe that the person was driving.[2] The latter can exist without the former ever occurring. A reading of *Evans* shows that the jurisdictional element (driving), has been eliminated as an issue. In Nevada an individual can lose his driver's license for drunk driving when he never drove. Such conduct chills the right to travel and is harmful to interstate commerce. For example, tourists and commercial drivers from other

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[1] Since the *Evan's* court has held that proof of driving is a non-issue, jurisdiction can never be raised or challenged.

[2] The Nevada implied consent is triggered only if the individual is driving and while doing so is under the influence of intoxicating liquor.

states are equally subjected to Nevada's driving laws. This Court mut grant the instant Writ of Certiorari and more fully examine the issue presented by Petitioner Evans.

NEVADA'S IMPLIED CONSENT LAW, AS INTERPRETED, AUTHORIZES THE SEIZURE OF A CITIZEN ON A STANDARD OF LESS THAN PROBABLE CAUSE, A VIOLATION UNDER THE UNITED STATES CONSTITUTION.

The Department's Opposition takes the position that Nevada licensed drivers' have agreed under the implied consent law to give up their Fourth Amendment protection not to be subjected to a "search" and "seizure" absent probable cause. This position is in error for several reasons. First, a person cannot be forced or coerced to abandon a constitutional right to be allowed to travel in and outside Nevada. See *Shapiro v. Thompson*, 394 U.S. 618 (1969), where the court stated,

> MR. JUSTICE STEWART said for the Court in *United States v. Guest*, 383 U.S. 745, 757-758 (1966):
>
> > The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.
> >
> > . . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any

> event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

This Court went on further to say,

> If a law has
>
> > no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.
>
> *United States v. Jackson*, 390 U.S. 570, 581 (1968).

Second, the Department fails to address out of state drivers. Persons issued a drivers' license from the other forty-nine (49) states did not agree to give up their Fourth Amendment protection. Lastly, the Department argues that Nevada's implied consent law does to concern arrests.

> Nevada's implied consent law is not an arrest statute; it is a consent statute that applies to all Nevada drivers' licenses.
>
> Respondent's Opposition Brief, page 6.

This position is meritless. Section 3 of NRS 484.382 (part of the implied consent law) states,

> 3. If the person fails to submit to the test, the officer shall seize his license or permit to drive as provided in NRS 484.385, and if reasonable grounds otherwise exist, *the officer shall arrest him* and take him to a convenient place for the administration of an available evidentiary test under NRS 484.383.

The Nevada implied consent law authorizes a police officer to arrest the individual upon "reasonable grounds" to

obtain an evidentiary test under NRS 484.383. We already know that "reasonable grounds" in Nevada means a standard less than probable cause. *State of Nevada, Department of Motor Vehicles v. Torres*, 105 Nev. 558, 779 P.2d 959 (1989). The *Evans* decision affects every driver, whether Nevada citizens or others, on Nevada's roads and highways. A more thorough look at the issue raised here is clearly appropriate. The instant Writ of Certiorari must be granted.

CONCLUSION

Nevada's implied consent law is triggered only if a person drove and the police officer had reasonable grounds to believe that the driver was under the influence of intoxicating liquor. Driving is a jurisdictional element. It is black letter law that jurisdiction can be challenged at any time. See *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). *Evans* eliminates jurisdiction from consideration, a clear due process violation.

Equally important, Nevada's implied consent law violates the United States Constitution because it allows a "search" and "seizure" on less than probable cause. The instant Writ of Certiorari must be granted.

Respectfully submitted,

JOHN GLENN WATKINS
Counsel of Record
804 S. Sixth Street
Las Vegas, Nevada 89101
(702) 383-1006
Attorney for Petitioner